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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
Central Division

In re BRIAN A. KITTS, Debtor. --- J. KEVIN BIRD, Chapter 7 Trustee, Appellant/Cross-Appellee, vs. WINTERFOX, LLC, Appellee/Cross-Appellant.	**RESPONSE AND REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE** District Court Case No. 2:10-cv-111 [Oral Argument Requested] Bankruptcy Case No. 05-27158 JAB (Chapter 7) Adversary Proceeding No. 06-02250

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STATEMENT OF ADDITIONAL FACTS

In 1998, Brian Kitts ("**Kitts**" or the "**Debtor**") purchased a home located at 2580 Bear Hollow Drive, Park City, Utah,[1] where he lived with his wife and children.[2] Since purchasing the home in 1998, legal title to the home has been held at various times in the names of "Brian Kitts", "Laurie Kitts", "Brian Kitts and Laurie Kitts", and "Sunpeak Holdings, Inc." ("**Sunpeak**"),[3] a corporation that was, at all times, owned by the Debtor and his wife, Laurie Kitts.[4]

In the fall of 2004, Kitts was facing the loss of his family's home to three foreclosing lien creditors, Ed Ingram ("**Ingram**"), Wells Fargo Bank, ("**Wells Fargo**"), and Washington Mutual Bank ("**Washington Mutual**").[5]

Kitts incurred the obligations represented by these liens for personal, family or household purposes. For example, in 2001, Kitts contracted with Ingram to build a three-car garage as an addition to Kitts' home, but Kitts fired him after Ingram poured the foundation incorrectly.[6] On October 5, 2001, Ingram recorded a Notice of Lien against

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[1] Applt. Appx. at 18 (Findings of Fact & Conclusions of Law ("**Findings and Conclusions**") ¶ 1).

[2] Applt. Appx. at 18 (Findings and Conclusions ¶ 2).

[3] Applt. Appx. at 18 (Findings and Conclusions ¶ 3).

[4] Applt. Appx. at 18 (Findings and Conclusions ¶ 4).

[5] Applt. Appx. at 22 (Findings and Conclusions ¶ 39).

[6] Applt. Appx. at 18-19 (Findings and Conclusions ¶¶ 9-10).

Kitts' home for labor, services and materials.[7] On February 12, 2002, Ingram commenced an action in state court to foreclose his claimed lien and, on March 6, 2002, recorded a Lis Pendens against Kitts' home.[8] By December 2004, Ingram had threatened to foreclose if Kitts did not pay off the alleged debt.[9] Because Ingram's lien arose from the building of the three-car garage to Kitts' home, any payment to Ingram was attributable to personal, family, or household purposes.[10]

In November 2001, Kitts and his wife obtained a loan from Washington Mutual (the "**Washington Mutual Loan**") in the principal amount of $605,000 secured by a trust deed on Kitts' home.[11] In November 2001, the Debtor and Laurie Kitts were spending significant funds to finish the construction for the three-car garage they were constructing on Kitts' home, and they needed the Washington Mutual Loan to cover living expenses and to finish the construction project.[12] The Washington Mutual Loan also paid off a loan Laurie Kitts obtained in January 2001 from Crescent Mortgage for approximately $275,000 that was secured with a mortgage on Kitts' home.[13] Laurie Kitts obtained this loan to purchase a home for her mother in Park City, Utah so that her mother could live closer to her, Kitts, and their children.[14] The majority of the Washington Mutual Loan proceeds were used for personal, family or household purposes.[15]

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[7] Applt. Appx. at 19 (Findings and Conclusions ¶ 11).

[8] Applt. Appx. at 19 (Findings and Conclusions ¶ 12).

[9] Applt. Appx. at 19 (Findings and Conclusions ¶ 13).

[10] Applt. Appx. at 19 (Findings and Conclusions ¶ 14).

[11] Applt. Appx. at 19 (Findings and Conclusions ¶ 15).

[12] Applt. Appx. at 19 (Findings and Conclusions ¶ 16).

[13] Applt. Appx. at 20 (Findings and Conclusions ¶ 19).

In July 2002, Laurie Kitts obtained a line of credit secured by a trust deed on Kitts' home from Wells Fargo (the "**Wells Fargo Loan**").[16] Laurie Kitts obtained the Wells Fargo Loan to pay family living expenses and to complete the three-car garage addition to Kitts' home.[17] Laurie Kitts borrowed approximately $307,977.67 on the Wells Fargo Loan,[18] the majority of which was used for personal, family, or household purposes.[19]

To prevent the loss of his home to foreclosure of these three liens,[20] Kitts obtained two loans from Winterfox, LLC ("**Winterfox**") totaling $1,389,603.47, evidenced by a loan agreement and two notes and secured by trust deeds on his home (the "**Loans**").[21] The first loan for $1,350,000 (the "**First Loan**") was insufficient to pay off Kitts' existing obligations,[22] particularly the Wells Fargo lien, because Wells Fargo took several weeks to provide the title company with an accurate payoff amount.[23] So, Winterfox made a second loan to Kitts for $39,603.47 (the "**Second Loan**").[24]

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[14] Applt. Appx. at 20 (Findings and Conclusions ¶ 20).

[15] Applt. Appx. at 21, 27 (Findings and Conclusions ¶ 29, 73). The bankruptcy court identifies the exact dollar amount of the Washington Mutual Loan proceeds that were used for personal purposes at Finding of Fact ¶ 73 at Applt. Appx. 27.

[16] Applt. Appx. at 21 (Findings and Conclusions ¶ 30).

[17] Applt. Appx. at 21 (Findings and Conclusions ¶ 31).

[18] Applt. Appx. at 22 (Findings and Conclusions ¶ 32).

[19] Applt. Appx. at 22, 27 (Findings and Conclusions ¶¶ 38, 73). The bankruptcy identifies the exact dollar amount of the Wells Fargo Loan proceeds that were used for personal purposes at Finding of Fact ¶ 73 at Applt. Appx. at 27.

[20] Applt. Appx. at 23 (Findings and Conclusions ¶ 40).

Legal title to the home was held by Sunpeak prior to the execution of the Loans.[25] Though Winterfox had a title report showing that title was held by Sunpeak,[26] Winterfox drafted the loan agreement (the "**Loan Agreement**"), the notes and the trust deeds to make the Loans to Kitts personally.[27] Sunpeak was not mentioned anywhere in the loan documents that Winterfox itself drafted.[28] Because the Loans were made to Kitts personally, Kitts placed title to his home in his name prior to signing the notes for the

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[21] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 54, 60).

[22] Applt. Appx. at 25 (Findings and Conclusions ¶ 59).

[23] Appellee Supp. Appx. at 924-25 (Trial Tr. 12/1/09 at p. 127-28 (testimony of Aaron Olivarez ("**Olivarez**")) and at 981 (Trial Tr. 12/1/09 at p. 209 (testimony of Kitts)).

[24] Applt. Appx. at 25 (Findings and Conclusions ¶ 60).

[25] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 57, 62).

[26] Applt. Supp. Appx. at 106 (Trial Tr. 12/1/09 at p. 70 (testimony of Olivarez)).

[27] Applt. Supp. Appx. at 135 (Trial Tr. 12/1/09 at p. 201(testimony of Kitts)) and 5-9, 57-65 (Trial Exs. 1-2, 54).

[28] Applt. Supp. Appx. at 5-9 (Trial Exs. 1-2).

Loans and the trust deeds in favor of Winterfox.[29] After the Loans, legal title was placed back in Sunpeak.[30] Kitts signed a quit-claim deed transferring legal title from Sunpeak to Kitts on April 22, 2005.[31]

The notes for the Loans address the right to collect attorney's fees, but only allow the recovery of Winterfox's attorney's fees for the "costs and expenses of collection."[32] And the Loan Agreement does little to expand Winterfox's right to recovery of fees as it covers collection of fees from disputes in connection with "the provisions of [the Loan] Agreement."[33] Though the issue of attorney's fees *under the notes* was raised in the Amended Adopted Pre-trial Order, Winterfox did not seek attorney's fees pursuant to the Loan Agreement.[34] Even Winterfox's proof of claim, which seeks attorney's fees under the notes, does not attach the Loan Agreement.[35] Nor does Winterfox make any argument for the recovery of its attorney's fees in its proposed findings of fact and conclusions of law,[36] its trial brief,[37] its opening or closing statement at trial.[38]

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[29] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 58, 63).

[30] *Id.*

[31] Applt. Appx. at 26 (Findings and Conclusions ¶ 69).

[32] Applt. Supp. Appx. at 5-9 (Trial Exs. 1, 2).

[33] Applt. Supp. Appx. at 57-65 (Trial Ex. 54).

[34] Adversary Proceeding No. 06-2250 ("**Adv. Proc.**") Docket No. 226 at p. 14.

[35] Applt. Supp. Appx. at 10-20 (Trial Ex. 6).

[36] Adv. Proc. Docket No. 240.

In the fall of 2005, counsel for Kitts, Russell S. Walker ("**Walker**"), requested from Winterfox's counsel copies of any TILA notices and disclosures that Winterfox had prepared and sent to Kitts in connection with the Loans.[39] In February 2006, Winterfox's counsel provided copies to Walker of certain TILA notices and disclosures (the "**TILA Disclosures**") alleged to have been sent to the Kitts.[40]

Winterfox testified that the documents labeled with Bates Nos. WF000001 through WF000017 constitute the disclosures sent by Winterfox in connection with the First Loan on December 5, 2004.[41] Winterfox further testified that the documents labeled with Bates Nos. WF000018 through WF000036 constitute the disclosures sent by Winterfox in connection with the Second Loan on December 29, 2004.[42]

Most of the TILA Disclosures have a "MAILED" stamp on them with a date written in by Marco Fields ("**Fields**"), the Winterfox agent who prepared the TILA Disclosures and reviewed comparables to determine the value of Kitts' home[43] as a

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[37] Adv. Proc. Docket No. 239.

[38] Adv. Proc. Docket Nos. 304, 305.

[39] Applt. Appx. at 28 (Findings and Conclusions ¶ 78).

[40] Applt. Appx. at 28 (Findings and Conclusions ¶ 79).

[41] Applt. Appx. at 28 (Findings and Conclusions ¶ 80) and 235 (Trial Ex. 10 at p. 16); Applt. Supp. Appx. at 21-27 (Trial Ex. 7).

[42] Applt. Appx. at 29 (Findings and Conclusions ¶ 81) and 235-36 (Trial Ex. 10 at p. 16-17); Applt. Supp. Appx. at 38-56 (Trial Ex. 8).

[43] Applt. Appx. at 29 (Findings and Conclusions ¶ 82).

member of "the team that [Winterfox] put together"[44] to assist it "in *originating* private or hard-money loans."[45] These handwritten dates include: "12-5-05"; "12-5-06"; "12-29-05"; and "12-27-05".[46] Fields testified in her deposition that the dates that she wrote on the TILA Disclosures were inadvertently inaccurate,[47] and that the TILA Disclosures for the First Loan were sent on December 5, 2004.[48]

The software company that created the forms used in the TILA Disclosures testified that some of these forms allegedly sent on December 5 and 29, 2004 were not released to the public, even in beta form, until April 2005.[49] Therefore, the TILA Disclosures could not have been prepared by Winterfox nor sent to Kitts any earlier than April 2005,[50] more than three months after the Loans were made.

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[44] Applt. Supp. Appx. at 100-101 (Trial Tr. 12/1/09 at pp. 38-39 (testimony of George Bybee ("**Bybee**")).

[45] Applt. Supp. Appx. at 1 (Trial Tr. 12/7/09 at p. 83 (testimony of Fields)) (emphasis added).

[46] Applt. Supp. Appx. at 21-56 (Trial Exs. 7, 8).

[47] Applt. Appx. at 29 (Findings and Conclusions ¶ 84); Applt. Supp. Appx. at 2-3 (Trial Tr. 12/7/09 at pp. 88-89 (testimony of Fields)).

[48] Applt. Supp. Appx. at 4 (Trial Tr. 12/7/09 at p. 101 (testimony of Fields)).

[49] Applt. Appx. at 29 (Findings and Conclusions ¶ 86); Applt. Supp. Appx. at 122-25, 126-27 (Trial Tr. 12/1/09 at pp. 167-70, 173-74 (testimony of Brian Telford of Calyx Software)) and 32 (Trial Ex. 7 at WF 12) and 40 (Trial Ex. 8 at WF 20).

[50] Applt. Appx. at 19 (Findings and Conclusions ¶ 87).

In the TILA Disclosures, Winterfox further admits that the loan applicant was "Brian Kitts" and that "upon taking title to the real property [at 2580 Bear Hollow Drive], [Brian Kitts'] occupancy status will be as follows: Primary Residence."[51]

Though Sunpeak had rental income for leased office space in an office building,[52] Kitts' home never generated business income. At the end of 2001, Kitts merely received a payment for allowing people to stay in his home for a period of days during the 2002 Winter Olympics.[53] Consistent with the true character of Kitts' residence, Kitts listed his home as his asset on the schedules of his personal chapter 13 bankruptcy filed on the same day as Sunpeak's chapter 11 bankruptcy[54] and in his personal bankruptcy from which this appeal arises.

In the Trustee's memorandum supporting his motion for leave to file an amended and supplemental complaint, the Trustee made clear that the amended complaint removed the claim under Utah Consumer Credit Code (the "**UCCC**") that was continued in the original complaint.[55] On April 8, 2009, the bankruptcy court entered the order allowing the Trustee to file the amended complaint attached to the order, which abandoned the UCCC claim.[56] Between April 8, 2009 and May 22, 2009, when the Trustee filed the amended complaint, Winterfox chose not to communicate with the Trustee's counsel regarding the amended complaint or to confirm that the UCCC claim remained abandoned.[57]

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[51] Applt. Appx. at 29 (Findings and Conclusions ¶ 88); Applt. Supp. Appx. at 30 (Trial Ex. 7 at p. WF 10) and 42 (Trial Ex. 8 at p. WF 22).

[52] Appellee Supp. Appx. at 1055-56 (Trial Tr. 12/3/09 at p. 69-70 (testimony of Kitts)).

[53] Applt. Supp. Appx. at 130 (Trial Tr. 12/1/09 at p. 185 (testimony of Kitts)).

[54] Applt. Supp. Appx. at 74 (Trial Ex. 596 at p. 8).

[55] Applt. Appx. at 316 (Memorandum in Support of Motion for Leave to File Amended and Supplemental Complaint at p. 2).

ARGUMENT

I. REPLY TO APPELLEE WINTERFOX'S BRIEF

A. Winterfox "Originated" Both Loans

Winterfox is a creditor because it "originated" at least two consumer loans[58] that are high-cost mortgages within a twelve-month period.[59] Because the bankruptcy court relied on a dictionary definition of the term "originate" outside of the mortgage lending context, the court made the incorrect legal conclusion that Winterfox did not "originate" the Loans it made to Kitts. Winterfox mischaracterizes the issue on appeal as a factual issue subject to the "clearly erroneous" standard of review. But the Trustee need not dispute the bankruptcy court's factual findings relied upon by the bankruptcy court to reach this conclusion. Rather, the issue on appeal is whether the bankruptcy court applied the correct definition of "originate" to the facts—thus, this is purely a legal issue requiring a *de novo* review.[60]

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[56] Applt. Appx. at 252 (Order).

[57] Applt. Appx. at 163 (Declaration of Aaron B. Millar at ¶ 8).

[58] Winterfox claims that the bankruptcy court did not determine whether Winterfox made one loan or two for purposes of TILA. (Brief of Appellee and Cross-Appellant Winterfox, LLC ("**Appellee Brief**") at p. 28). Contrary to Winterfox's claim, the bankruptcy court did find that Winterfox made two loans to Kitts (Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 54, 60)), and referred to them repeatedly as the "First Loan" and the "Second Loan." (Applt. Appx. at 24-33 (Findings and Conclusions).) Winterfox claims that the Second Loan should be disregarded "for TILA purposes" because it was only needed after Kitts requested funds for Nevwest on the day of closing (Appellee Brief at pp. 28-29). This argument is not supported by the facts or the law. The second loan was needed to payoff the Wells Fargo lien because Wells Fargo took several weeks to provide the title company with an accurate payoff amount (Appellee Supp. Appx. at 924-25 (Trial Tr. 12/1/09 at p. 127-28 (testimony of Olivarez)) and at 981 (Trial Tr. 12/1/09 at p. 209 (testimony of Kitts))) not because of a request for funds for Nevwest. Moreover, Winterfox cites no legal authority to support the disregarding of the Second Loan, even if the parties originally contemplated only one loan. And, in fact, case

Winterfox cites a host of findings of fact that it claims the bankruptcy court relied upon in reaching its conclusion that Winterfox did not "originate" the Loans it made to Kitts. Yet, this recitation of factual findings is unavailing because these facts are irrelevant to the issue on appeal. Rather, when the term "originate" is properly defined in the mortgage context, only one undisputed fact is necessary to the analysis—Winterfox made or issued the Loans to Kitts.[61] And, if additional facts are necessary, the record is

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law supports the bankruptcy court's conclusion that there were two loans regardless of whether the parties anticipated making only one loan. *See Williams v. Gelt Fin. Corp. (In re Williams)*, 232 B.R. 629, 635 (Bankr. E.D. Pa. 1999) (finding two loans under TILA for loans obtained from the same lender within a two-month period, though the second loan was not anticipated by the parties when the first loan was made).

[59] *See* 15 U.S.C. § 1602(f).

[60] *In re Midkiff*, 342 F.3d 1194, 1197 (10th Cir. 2003).

[61] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 54, 60).

replete with undisputed facts as to the process Winterfox undertook to make the Loans, including examining the packet of Kitts' financial information and loan application to determine whether it should make a loan to Kitts[62] (*i.e.,* Winterfox qualified the borrower), appraising the collateral for the Loans,[63] "prepar[ing] the documents necessary to complete the First and Second Loans,"[64] and processing, underwriting[65] and funding the Loans.[66] Furthermore, Winterfox admitted it was "*originating* private or hard-money loans" that it made in 2003 and 2004.[67]

To demonstrate the unsupportable definition employed by the bankruptcy court, the Trustee cited multiple cases in which courts determined that a lender "originated" the loan at issue even though the borrower had initiated contact with the lender.[68] Winterfox attempts to distinguish these cases by pointing out that the borrowers described therein did not have agents assisting them. Winterfox's argument implies that if the borrower (1) hires an agent (2) who makes initial contact with the lender *and* (3) prepares a loan packet, then the lender did not "originate" the loan that it makes. But, like the bankruptcy court's decision, this argument relies on a meaning of "originate" that is divorced from its context. "Statutory language has meaning only in context."[69] In its proper context, to "originate" a loan simply means to "make" a loan. The presence and assistance of the borrower's agent, whatever form it takes, is irrelevant to the determination of whether a lender "originates" a loan.

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[62] Applt. Appx. at 25 (Findings and Conclusions ¶¶ 64.a and 64.c).

[63] Applt. Appx. at 24 (Findings and Conclusions ¶ 51).

[64] Applt. Appx. at 33 (Findings and Conclusions ¶ 24).

[65] Applt. Appx. at 88 (Trial Tr. 12/1/09 at p. 61 (testimony of Olivarez)).

[66] Applt. Appx. at 26 (Findings and Conclusions ¶ 65).

[67] Applt. Supp. Appx. at 112 (Trial Tr. 12/7/09 at p. 83 (testimony of Fields)) (emphasis added). Fields was an agent of Winterfox who was a member of "the team that [Winterfox] put together" to make hard-money loans. (Applt. Supp. Appx. at 100-01 (Trial Tr. 12/1/09 at pp. 38-39 (testimony of Bybee)).

[68] Appellant's Brief at p. 20 n. 89.

Winterfox also argues that the Trustee failed to show that the term "originate" has any special meaning in the mortgage industry. This claim could not be further from the truth. The Trustee cited no less than four definitional sources that demonstrate the term's contextual meaning within the mortgage industry.[70] Furthermore, Winterfox's own agent uses the term in its proper context when she admits that she assisted "Winterfox in *originating* private or hard-money loans."[71]

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[69] *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005).

[70] Appellant's Brief at pp. 18-19 (citing context-specific definitions from the "Legal Dictionary" section of the same internet dictionary site used by the bankruptcy court, a banking glossary, the implementing regulations for the Real Estate Settlement Procedures Act ("**RESPA**"), and the Senate Committee's interchanging the word "make" with "originate.").

[71] Applt. Supp. Appx. at 112 (Trial Tr. 12/7/09 at p. 83 (testimony of Fields)) (emphasis added).

Winterfox also attempts to simply dismiss the Senate Committee's interchangeable use of "make" and "originate" as "inartful drafting." When the legislative history is read as a whole, Winterfox claims, the language used by the Committee demonstrates that a lender could not "originate" a loan if it did not actively shop or market the loans.[72] The Senate Committee's recitation of its concern with "reverse redlining," however, does nothing to define "originate," nor does it even imply that the application of TILA should be limited to those creditors who actively market these loans[73] or to loans made to homeowners of a certain income.[74]

To the contrary, a creditor need only "make" the requisite number of high-cost mortgages to be covered by TILA. And other than a codified definition, nothing could be more instructive on the meaning of "originate" than the Senate Committee's repeated interchanging of the words "originate" with "make," particularly when such meaning coincides with every industry source cited by either party. For example, the Senate Committee states:

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[72] Appellee Brief at p. 27.

[73] Even if actively shopping loans were required to "originate" a loan, which it clearly is not, Winterfox met this requirement. Winterfox went into the hard money lending business with the objective that Olivarez find hard money loans for Winterfox to make. *See* Appellant's Brief at p. 26. Contrary to Winterfox's aspersions, it was not a passive player in these high cost mortgage transactions. *See* discussion *infra* Part I.B.

[74] Notably, Winterfox provides no factual support for its unfounded and irrelevant claims concerning Kitts' income or sophistication.

> To ensure that consumers understand the terms of such loans and are protected from high pressure sales tactics, the legislation requires creditors *making* High Cost Mortgages to provide a special, streamlined High Cost Mortgage disclosure three days before consummation of the transaction.[75]
>
> . . .
>
> The current definition of creditor in Truth-in-Lending excludes those who *originate* four or fewer mortgages per year. For High Cost Mortgages, the Committee has extended coverage to anyone *making* a high cost mortgage through a broker and anyone who *makes* more than one High Cost Mortgage in a twelve month period. The Committee seeks to prevent brokers from evading the legislation by matching each borrower with a different private individual acting as lender.[76]
>
> . . .
>
> In light of the damage that can be caused by unscrupulous creditors *making* High Cost Mortgages and the careful targeting of the legislation, the Committee bill provides increased damages for failure to comply with the requirements . . . .[77]

Not surprisingly, Winterfox cites no industry definitional source nor a single decision to support the bankruptcy court's definition. Reviewing *de novo* the court's decision to apply a definition of "originate" devoid of any context makes amply clear that Winterfox "originated" the Loans to Kitts because it made the Loans to Kitts.

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[75] *See* Exh. 1 to Appellee Brief (S.R. Rep. No. 103-169, at 21 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1881, 1905, 1993 WL 444316, a copy of which is attached as Exhibit 1 to Appellee Brief (emphasis added).

[76] *Id.* (S.R. Rep. at 23, *reprinted in* 1994 U.S.C.C.A.N. at 1908) (emphasis added).

[77] *Id.* (S.R. Rep. at 25, *reprinted in* 1994 U.S.C.C.A.N. at 1911-12) (emphasis added).

B. Winterfox Originated at Least One Loan Through a "Mortgage Broker"

Winterfox is also a "creditor," alternatively, because it originated a high-cost mortgage through a "mortgage broker."[78] The issue on appeal is whether the bankruptcy court applied the appropriate definition of "mortgage broker" and correctly applied the holdings of relevant case law to the facts here—this is purely a legal issue that is reviewed *de novo,*[79] not an issue of fact as Winterfox claims.

Though the term "mortgage broker" was not a defined term under TILA when the loans were made in December 2004, the new definition is instructive for multiple reasons. First, the legislative history preceding the adoption of the "mortgage broker" definition does not indicate that the codified definition was a departure from case law previously interpreting "mortgage broker."[80] Second, courts were determining entities to be "mortgage brokers" on grounds no different than those in the new definition. For example, in *In re Dukes*,[81] the court used the same reasoning and language of what would become the current definition of "mortgage broker"—"arrange" and "obtain" and "extension of consumer credit"—to find the mortgage company to be a "mortgage broker."[82] Consistent with the new definition and *Dukes*, "arrange for" and "obtain an extension of consumer credit" is exactly what Olivarez did for Kitts. Winterfox's attempt to discredit the applicability of *Dukes* is ineffective. That mortgage brokers were then considered, but would no longer be, "creditors" under TILA does not make the *Dukes* court's analysis of who is a "mortgage broker" any less helpful.

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[78] 15 U.S.C. § 1602(f).

[79] *In re Midkiff*, 342 F.3d 1194, 1197 (10th Cir. 2003).

[80] Truth in Lending, 73 Fed. Reg. 44522, 44565 (July 30, 2008) (codified at 12 C.F.R. pt. 226), attached hereto in Addendum to Appellant Trustee's Response and Reply Brief. This same legislative history also rejects Winterfox's argument that TILA's current "mortgage broker" definition would not apply to Olivarez. The current definition applies to a person who "arranges, negotiates, or otherwise obtains an extension of credit for another person." Winterfox claims that Olivarez would not be covered by the definition because he did not arrange, negotiate or obtain a loan *for Kitts* because Olivarez represented Winterfox's interests. (Appellee Brief at p. 29.) The "for another person" language, however, was added to the definition for the express purpose of ensuring that a borrower who negotiates a loan does not qualify as a "mortgage broker" under the statute—the language was not added to limit the application of the definition to only mortgage brokers who represent the interests of borrowers. *Id.* at 44565, 44614 ("The Board is adopting the definition of mortgage broker with a minor change to clarify that

Furthermore, Winterfox's attempt to distinguish the actions of the mortgage broker in *Hodges v. Swafford*[83] from those of Olivarez is unavailing. A side-by-side analysis of the actions taken by the broker in *Hodges* and the corresponding action taken by Olivarez evidences their striking similarity:

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the term 'mortgage broker' does not include a person who arranges, negotiates, or otherwise obtains an extension of credit for him or herself." "[A]lthough consumers themselves often arrange, negotiate, or otherwise obtain extensions of consumer credit on their own behalf, they do not do so . . . for another person and therefore, are not mortgage brokers under this section.")

[81] 24 B.R. 404 (Bankr. E.D. Mich. 1982).

[82] *Id.* at 416.

[83] *Hodges v. Swafford*, 863 N.E.2d 881 (Ind. Ct. App. 2007), *opinion amended on rehearing*, 868 N.E.2d 1179 (Ind. Ct. App. 2007).

Broker in *Hodges v. Swafford*	**Olivarez**
Certified mortgage broker.[84]	Licensed mortgage broker.[85]
[No mention of the broker bringing any other loans to her brother (the lender).]	Found several other loan opportunities that it brought to Winterfox,[86] a hard money lender that entered the business with the intent that Olivarez find loans for Winterfox to make.[87]
Contacted by the borrower and proposed her brother as a lender.[88]	Contacted by the borrower's agent[89] and proposed Winterfox as a lender.[90]
Took the borrower's application.[91]	Received the borrower's application and reviewed it to determine whether to recommend that Winterfox make Kitts a loan.[92]
Found a loan for her brother[93] and brought the lending opportunity to her brother and recommended that he take it.[94]	Found a loan for Winterfox and brought the loan opportunity to Winterfox[95] and recommended that Winterfox take it.[96]

[84] *Hodges*, 863 N.E.2d at 888.

[85] Applt. Supp. Appx. at 118a (Trial Tr. 12/1/09 at p. 129 (testimony of Olivarez)).

[86] Applt. Appx. at 83-86 (Trial Tr. 12/1/09 at pp. 30-31, 33-34 (testimony of Bybee)).

[87] Applt. Appx. at 554 (Trial Tr. 12/1/09 sealed testimony of George Bybee at p. 10) and 83-86 (Trial Tr. 12/1/09 at pp. 30-31, 33-34 (testimony of Bybee)).

[88] *Hodges*, 863 N.E.2d at 883-84.

[89] Applt. Supp. Appx. at 102 (Trial Tr. 12/1/09 at p. 63 (testimony of Olivarez)).

[90] Applt. Supp. Appx. at 103 (Trial Tr. 12/1/09 at p. 64 (testimony of Olivarez)); Applt. Appx. at 23 (Findings and Conclusions ¶ 50).

[91] *Hodges*, 863 N.E.2d at 887.

[92] Applt. Supp. Appx. at 103-05, 119 (Trial Tr. 12/1/09 at pp. 64-66, 132 (testimony of Olivarez)).

[93] *Hodges*, 863 N.E.2d at 887.

Broker in *Hodges v. Swafford*	**Olivarez**
Discussed with borrower and lender the information required to complete the contract, such as the schedule of payments, etc.[97] and met with the borrower prior to closing.[98]	Discussed and negotiated the terms of the contract with the borrower and the borrower's agent on behalf of Winterfox,[99] which meeting took place at the borrower's home before the closing.[100]
Drafted the land contract[101] which was the form the loan took.	Drafted the loan agreement[102] and either drafted or caused the drafting of the notes and trust deeds for Winterfox.[103]
Obtained a pre-comparables sales analysis on the borrower's home.[104]	Evaluated the comparable sales for the borrower's home.[105]

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[94] *Hodges*, 863 N.E.2d at 884.

[95] Applt. Appx. at 86 (Trial Tr. 12/1/09 at p. 34 (testimony of Bybee)); Applt. Supp. Appx. at 100-01 (Trial Tr. 12/1/09 at pp. 38-39 (testimony of Bybee)).

[96] Applt. Appx. at 25 (Findings and Conclusions ¶ 64.c).

[97] *Hodges*, 863 N.E.2d at 887.

[98] *Hodges*, 863 N.E.2d at 884.

[99] Applt. Supp. Appx. at 99 (Trial Tr. 12/1/09 at p. 35 (testimony of Bybee)) and at 134 (Trial Tr. 12/1/09 at p. 192 (testimony of Kitts)).

[100] Applt. Supp. Appx. at 107 (Trial Tr. 12/1/09 at p. 72 (testimony of Olivarez)).

[101] *Hodges*, 863 N.E.2d at 887.

[102] Applt. Supp. Appx. at 117-18 (Trial Tr. 12/1/09 at pp. 99-100 (testimony of Olivarez)).

[103] Applt. Supp. Appx. at 99 (Trial Tr. 12/1/09 at p. 35 (testimony of Bybee)); Applt. Appx. at 25, 33 (Findings and Conclusions ¶¶ 64.e, 24) and 90-93 (Trial Tr. 12/1/09 at pp. 101-04 (testimony of Olivarez)).

[104] *Hodges*, 863 N.E.2d at 887.

[105] Applt. Supp. Appx. at 119 (Trial Tr. 12/1/09 at p. 132 (testimony of Olivarez)).

Broker in *Hodges v. Swafford*	**Olivarez**
Ordered an appraisal of the borrower's house.[106]	Appraised the property himself.[107]
The title insurance company faxed a copy of the title insurance commitment to the broker.[108]	Requested a title policy for Winterfox,[109] and the title insurance company gave Olivarez a copy of the title insurance policy for Winterfox.[110]
[Not at closing.][111]	Attended the closing on behalf of Winterfox.[112]
	Called Winterfox to ensure that the money for the loan was funded.[113]
	Directed the title company how he, Michael Falk ("**Falk**"), and Winterfox should be paid from the "Loan Origination Fee."[114]
	Paid $12,500 for his services from the loan proceeds,[115] which was the exact same amount as Kitts' mortgage broker, Falk.[116]

[106] *Hodges*, 863 N.E.2d at 887.

[107] Applt. Supp. Appx. at 107 (Trial Tr. 12/1/09 at p. 72 (testimony of Olivarez)).

[108] *Hodges*, 863 N.E.2d at 887.

[109] Applt. Supp. Appx. at 120-21 (Trial Tr. 12/1/09 at pp. 138-39 (testimony of Olivarez)).

[110] Applt. Supp. Appx. at 115-16 (Trial Tr. 12/1/09 at pp. 96-97 (testimony of Olivarez)).

[111] *Hodges*, 863 N.E.2d at 888.

[112] Applt. Supp. Appx. at 114 (Trial Tr. 12/1/09 at p. 85 (testimony of Olivarez)).

[113] Applt. Supp. Appx. at 114 (Trial Tr. 12/1/09 at p. 85 (testimony of Olivarez)).

[114] Applt. Appx. at 25-26 (Findings and Conclusions ¶ 64.e); Applt. Supp. Appx. at 108-13 (Trial Tr. 12/1/09 at p. 79-84 (testimony of Olivarez)).

[115] Applt. Supp. Appx. at 108-13 (Trial Tr. 12/1/09 at p. 79-84 (testimony of Olivarez)) and 66 (Trial Ex. 61); Applt. Appx. at 27 (Findings and Conclusions ¶ 73));

Broker in *Hodges v. Swafford*	**Olivarez**
[Testified that they were only acting as "sister and brother doing a personal favor" for the borrower.[117]]	[Stated that Olivarez was only acting as a "consultant" to Winterfox[118] "merely accommodat[ing] the request" for a loan.[119]

Winterfox misinterprets the bankruptcy court's conclusion that Olivarez was not a "mortgage broker"[120] by claiming that the conclusion is based on a number of additional, allegedly supporting facts. In so doing, Winterfox ignores the fact that the bankruptcy court correctly determined that, like the broker in *Hodges*, Olivarez was a liaison to the parties and drafted the loan documents. But, according to the bankruptcy court, Olivarez was not a "mortgage broker" because he did not bring the parties together. To support this conclusion and distinguish Olivarez from the broker in *Hodges*, the bankruptcy court

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[116] Applt. Appx. at 27 (Findings and Conclusions ¶ 73).

[117] *Hodges*, 863 N.E.2d at 888.

[118] Appellee Supp. Appx. at 855 (Trial Tr. 12/1/09 at p. 855 (testimony of Olivarez)). Just as the *Hodges* court saw through the "brother and sister doing a personal favor" characterization to what the broker actually did, the bankruptcy court and this Court should see through Olivarez's self-serving statements, in which he claims to be merely a "consultant," to the extensive services he actually performed. *United States v. Nunez*, 271 Fed. Appx. 66, 69 (2d Cir. 2008) (holding that a court need not "accept the defendant's self-serving characterizations of his role in an offense.") (internal quotation omitted). Regardless of what Olivarez calls himself, his actions remain those of a "mortgage broker." After all, "a rose by any other name would smell as sweet." William Shakespeare, *Romeo and Juliet*, Act II, Scene II.

[119] Appellee Brief at p. 27.

[120] This analysis is found in just three paragraphs of the court's Findings and Conclusions. (Applt. Appx. at 32-33 (Findings and Conclusions ¶¶ 22-24)).

cited only two facts: (1) Olivarez was not "actively shopping loans" for Winterfox, and (2) "[i]t was Falk that approached Olivarez"[121] as reflected in the following chart:

Ruling in *Hodges v. Swafford* re "Mortgage Broker"[122]	**Conclusion of Law No. 24 of Bankruptcy Court re "Mortgage Broker"**[123]
1. Acted as the parties' liaison prior to the closing	1. "Olivarez acted as a liaison prior to closing"
2. Prepared the documents necessary to complete the transactions	2. "Olivarez . . . prepared documents necessary to complete the First and Second Loans"
3. Brought the parties together	3. Olivarez did not bring the parties together because—unlike the broker in *Hodges*—
[a. Facts gave no indication that the broker had previously shopped loans for her brother (the lender).	**a. Olivarez was not "actively shopping loans" for Winterfox; and**
b. The borrower approached the mortgage broker, after which the broker proposed her brother as a lender.]	**b. Falk approached Olivarez**

By claiming that these two facts distinguish Olivarez from the broker in *Hodges*, the bankruptcy court misread of the opinion in *Hodges* because no such distinctions exist. First, there is no evidence that the broker in *Hodges* "actively shopped loans" for the lender, her brother.[124] Second, the borrower approached the broker in *Hodges*, just as Falk approached Olivarez.[125] Therefore, the bankruptcy court's reliance on *Hodges* for its conclusion is misplaced.

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[121] Applt. Appx. at 33 (Findings and Conclusions ¶ 24).

[122] *Hodges*, 863 N.E.2d at 888.

[123] Applt. Appx. at 33 (Findings and Conclusions ¶ 24) (emphasis added).

Winterfox claims that the bankruptcy court did not require that a mortgage broker initiate contact with the borrower in order to bring the parties together.[126] But the court's conclusion did, in fact, explicitly rely on the fact that it was Falk who approached Olivarez.[127] And Winterfox attempted to support the bankruptcy court's position by making the same argument with different words: "But for Falk contacting Olivarez, Winterfox would never have learned of Kitts . . . ."[128] However, making the "initial contact" determinative of "mortgage broker" status, as the bankruptcy court did, is simply not supported by any definition or case law cited by either party, including *Hodges*. Furthermore, the bankruptcy court's unprecedented narrowing of who can qualify as a "mortgage broker" contravenes the liberal construction required by TILA, a remedial statute.[129] For example, under the bankruptcy court's analysis, in a transaction with two persons performing "mortgage broker" duties, only the one who made the initial contact could be a "mortgage broker" under TILA, a result clearly not intended by TILA. Applied here, this interpretation altogether ignores Olivarez's role in bringing the parties together. Notwithstanding Winterfox's one-sided "but-for" argument, it is equally true that "but for" Olivarez proposing Winterfox as a lender, the parties would not have been brought together, and Kitts would never have obtained a loan from Winterfox. Thus, Olivarez's introduction of Winterfox to Kitts as a possible lender was just as necessary in bringing the parties together as was Falk's initial contact. Thus, from the undisputed facts it is clear that Olivarez did have a role in bringing the parties together and was, therefore, a "mortgage broker" under TILA.

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[124] And if such were a requirement, Olivarez met it. Winterfox entered the hard money lending business with the intent that Olivarez find loans for Winterfox to make (Applt. Appx. at 554 (Trial Tr. 12/1/09 sealed testimony of Bybee at p. 10) and 83-86 (Trial Tr. 12/1/09 at pp. 30-31, 33-34 (testimony of Bybee))—and Olivarez had been successful in finding several other loan opportunities that he brought to Winterfox. (Applt. Appx. at 83-86 (Trial Tr. 12/1/09 at pp. 30-31, 33-34 (testimony of Bybee))

Furthermore, by virtue of Winterfox's claim that Seitzinger, the broker in *Hodges*, "solicited" a loan for the lender (Appellee Brief at p. 32), when it was the borrower who approached Seitzinger asking for a loan, Winterfox conceded that it was not necessary for Olivarez to approach Falk in order to "solicit" a loan for Winterfox.

[125] The only things that the broker in *Hodges* did that Olivarez did not do are: "take" the loan application from the borrower and "obtain" the comparables, yet Olivarez analyzed both in deciding to recommend the loan to Winterfox.

[126] Appellee Brief at p. 32.

[127] Applt. Appx. at 33 (Findings and Conclusions ¶ 24).

[128] Appellee Brief at p. 32.

[129] *See Sierra Club v. Seaboard Farms, Inc.*, 387 F.3d 1167, 1172 (10th Cir. 2004) citing *United States v. Bestfoods*, 524 U.S. 51, 55 (1998)) (noting the Supreme Court affirmed a "broad and detailed definition" of a statutory term consistent with the liberal construction of the remedial statute at issue); *see also Maher v. Durango Metals*, 144 F.3d 1302, 1305 (10th Cir. 1998) (noting that the broad definition of a statutory term reflected the remedial purpose of the statute).

C. The Bankruptcy Court's Striking of Claims Was an Unjustified Punishment for the Trustee's Inadvertent Delay

Winterfox claims that the bankruptcy court's striking of the amended complaint was not governed by Fed. R. Civ. P. 41 because the entire case was not dismissed.[130] Rule 41, however, applies equally to the dismissal of *claims*.[131] Winterfox also claims that the bankruptcy court did not strike the amended complaint as a sanction,[132] but Winterfox does not explain why. Rather, citing to *Durham*, Winterfox claims that striking an amended pleading is decided according to the same standards as an order denying leave to amend a pleading.[133] *Durham*, however, stands for no such proposition.

In *Durham*, the plaintiff moved to amend her complaint to add a new claim three months after the expiration of the deadline for amending pleadings.[134] The district court "initially" granted the motion, and the plaintiff filed the amended complaint.[135] The defendant "challenged the court's decision" that had granted leave to amend and, in so doing, moved to strike the amended complaint.[136] The court reconsidered and reversed its earlier decision to allow amendment of the complaint and entered an order denying plaintiff leave to amend her complaint because the motion to amend was filed three months after the deadline for amending pleadings and, as a result, struck the amended complaint.[137] The plaintiff appealed "the court's denial of leave to amend her complaint."[138] The Tenth Circuit reviewed *this* order for an abuse of discretion and affirmed it because the motion to amend was not filed until three months after the deadline for filing amended pleadings.[139]

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[130] Appellee Brief at pp. 33-34.

[131] Fed. R. Civ. P. 41.

[132] Appellee Brief at p. 34.

[133] *Id.*

[134] *Durham v. Xerox Corp.*, 18 F.3d 836, 838 (10th Cir. 1994).

[135] *Id.* at 840.

[136] *Id.*

The express denial of leave to amend in *Durham*, and any other case reviewing a denial of leave to amend, is fundamentally different than the bankruptcy court's order to strike. Here, the Trustee sought leave to amend *before* the deadline for amending pleadings,[140] and the bankruptcy court granted the Trustee leave to amend[141] and never reconsidered or reversed its earlier decision for any reason. Rather, the bankruptcy court struck the Trustee's amended complaint because of the Trustee's inadvertent conduct

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[137] *Id.* at 838, 840.

[138] *Id.* at 838.

[139] *Id.* at 840 (citing *Woolsey v. Marion Lab., Inc.*, 934 F.2d 1452, 1462 (10th Cir. 1991). The court in *Woolsey* also reviews a denial of a motion to amend a complaint, not an order striking an amended complaint for conduct that occurred after the court granted the motion.

[140] Applt. Appx. at 325 (Motion for Leave to File Amended and Supplemental Complaint).

[141] Applt. Appx. at 252 (Order).

after being given leave to amend that allegedly prejudiced Winterfox. In this way, the bankruptcy court's order struck the new claims as a sanction imposed on the Trustee. That this striking of the amended complaint was effectively a dismissal of the URMPA claim with prejudice is supported by the way the bankruptcy court later treated its order as precluding further litigation of the new matters raised in the amended complaint when it struck the Trustee's objection to Winterfox's proof of claim.[142]

The bankruptcy court's order was significantly different than a denial of leave to amend in other important ways. For example, unlike a party opposing a motion for leave to amend, Winterfox already had notice of exactly what new claim the Trustee was asserting (and the one claim that the Trustee was dropping) well in advance of the dispositive motion deadline. Further, the parties had opportunity to conduct discovery on these claims.[143] Therefore, because the bankruptcy court's order to strike is not akin to a denial of leave to amend, it should not be analyzed as such.

In its brief, Winterfox fails to address each of the five criteria that the bankruptcy court was required to explicitly evaluate on the record. Instead, Winterfox solely addresses the prejudice element but fails to demonstrate any real prejudice, regardless of the standard under which this Court analyzes the striking of the amended complaint. For example, Winterfox's assertion that it suffered prejudice from having drafted a motion for summary judgment addressing the "causes of action in the original Complaint,"[144] which included the abandoned claim, under the UCCC, is not well-taken. By seeking to remove the UCCC claim in the amended complaint, the Trustee clearly indicated his view that the claim was not worth pursuing. Indeed, even without having filed the amended complaint, it is likely that the oral and written statements made by the Trustee's counsel (in connection with the motion to amend) that the claim would no longer be pursued would prevent further prosecution of the claim under doctrines of judicial admission and/or judicial estoppel. To avoid any question as to whether the Trustee was attempting to reverse his course and now pursue this claim, Winterfox needed only to have made a 30-second phone call to confirm that the claim remained abandoned.[145]

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[142] *See* Appellant's Brief at p. 29.

[143] *See* Appellant's Brief at pp. 30-31. Notably, Winterfox does not contend that it was prejudiced by a lack of notice or an inability to conduct discovery on these new claims.

Furthermore, Winterfox claimed that it was prejudiced by not being able to submit a summary judgment motion on the new URMPA claim and that the bankruptcy court could not permit Winterfox to file such a motion without Winterfox incurring the prejudice of additional delay. But this claimed prejudice does not hold up. For example, granting Winterfox an opportunity to file a motion for summary judgment would have caused no additional delay—the bankruptcy court needed only impose a shortened response time on the Trustee, as the Trustee had suggested to the bankruptcy court.[146]

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[144] Appellee Brief at p. 35.

[145] That Winterfox did not contact the Trustee concerning the delayed filing, but instead spent time to address claims the Trustee had clearly abandoned, makes clear that Winterfox was setting itself up to make a prejudice argument when the amended complaint was filed.

II. RESPONSE TO CROSS-APPELLANT WINTERFOX'S BRIEF

A. The Bankruptcy Court Correctly Held That Kitts' Motivation for Obtaining the Loans Was to Save His Residence from Foreclosure and That This Motivation Was a Personal, Family, or Household Purpose

Loans extended to natural persons "primarily for personal, family, or household purposes"[147] are consumer credit transactions subject to TILA's disclosure requirements.[148] The bankruptcy court correctly found that Kitts' motivation for getting the Loans was "to prevent the loss of [his] Residence" from foreclosure.[149] The bankruptcy court concluded that this motivation was a "personal, family, or household purpose" under TILA.[150] The court's ruling is strongly supported by case law.[151]

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[146] Applt. Appx. at 139 (Hearing Tr. 6/1/09 at p. 22). Notably, Winterfox does not dispute that the Trustee's proposed resolution would have eliminated any alleged prejudice.

[147] 15 U.S.C. § 1602(h).

[148] *Id.;* 15 U.S.C. §§ 1638-39.

[149] Applt. Appx. at 23 (Findings and Conclusions ¶ 40).

[150] Applt. Appx. at 30 (Findings and Conclusions ¶ 6).

[151] Winterfox does not dispute that saving one's home from foreclosure is a personal, family or household purpose covered by TILA.

In *Anderson v. Lester*,[152] for example, the debtor owned and operated a failing trucking business and was personally obligated on "many of the business debts." He had been examined by the attorney for a judgment creditor holding one of these debts and received a threat that his "home would be seized."[153] To prevent the loss of his home, the debtor obtained a loan secured by this home and applied the proceeds to "selected debts which represented the most immediate threats to the security of [his] home."[154] In evaluating whether the loan was a consumer credit transaction, the court was persuaded that saving one's home from seizure indicated a consumer purpose—even where the loan proceeds were applied to pay business-related debt.[155]

Similarly, in *Dawson v. Thomas (In re Dawson)*,[156] the borrower was about to lose her home to foreclosure and arranged for a new loan through a mortgage broker to save it. Because saving her home was the "primary motivation and purpose" for obtaining the loan, the court held that the new loan was a consumer credit transaction and TILA applied. Moreover, this purpose was determined to prevail even though the borrower had signed documents at closing that the loan was "for business and investment purposes only: Stop foreclosure/renovate."[157]

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[152] 382 So. 2d 1019, 1021 (La. App. 3 Cir. 1980).

[153] *Id.* at 1023.

[154] *Id.*

[155] *Id.*

[156] 411 B.R. 1 (Bankr. D.D.C. 2008).

In its cross-appeal, Winterfox makes essentially two claims that arise from its "Issue No. 2:" (1) Kitts' primary motivation for obtaining the Loans was to save a corporate asset from foreclosure; and (2) saving a corporate asset from foreclosure is not a "personal, family, or household purpose" under TILA. The Trustee does not dispute the second claim, and, as to the first claim, it is undisputed that Kitts obtained the Loans to save the property at 2580 Bear Hollow Drive from foreclosure. Rather, it is the nature or character of that property saved from foreclosure upon which Winterfox's appeal turns. For example, if the nature of the property is Kitts' home and the residence where he and his family live, then his primary motivation was to save his residence, which, as shown by the case law above, is a "personal, family, or household purpose" under TILA.[158] If the nature of the property is a corporate asset, notwithstanding the overwhelming, undisputed evidence to the contrary, then Kitts' motivation was to save a corporate asset from foreclosure, which motivation would not be a "personal, family, or household purpose" covered by TILA.

The character of Kitts' home is a factual issue. The bankruptcy court considered the evidence at trial and made a finding of fact that the character of the property that Kitts was saving from foreclosure was a residence: "To prevent the loss of the *Residence*, Kitts sought a new loan to pay off these foreclosing liens."[159] Winterfox disputes this finding of fact. But, pursuant to Fed. R. Civ. P. 52(a)(6), this finding of fact concerning the character of the property "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." An appellate court must accept a trial court's findings of fact unless, upon review of the entire evidence, this court is left with the definite and firm conviction that a mistake has been committed.[160] If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, then an appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.[161] This is so even when the trial court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.[162] This standard applies to any finding of fact because Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a [trial] court's findings unless clearly erroneous."[163]

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[157] *Id.* at 15-16.

[158] Winterfox does not dispute that the motivation to save one's residence from foreclosure would be a "personal, family or household purpose" under TILA.

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[159] Applt. Appx. at 23 (Findings and Conclusions ¶ 40) (emphasis added).

[160] *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

[161] *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985).

[162] *Id.* at 574.

Winterfox asserts that the nature of Kitts' home is a mixed question of law and fact.[164] Even if this were true, which it is not, the factual issues would predominate. Multiple courts have held that the trial court's determination of the character of property or an obligation is a factual issue reviewed under the "clearly erroneous" standard.[165] For example, in *Yarbro v. Commissioner of IRS*,[166] the issue was whether a taxpayer's loss from abandonment of unimproved land was an ordinary loss or a capital loss. To make this factual determination, the court was required to determine the nature of the property, which was defined by the taxpayer's purpose for holding the property, *i.e.*, whether the property was held for an investment or for use in his trade or business. The trial court examined the evidence and determined that the taxpayer was not in the trade or business of renting property, and, therefore, the property was not held for that purpose. The appeals court stated that the review of the nature of the property, or the taxpayer's purpose for holding the property, was "narrowly confined by the Rule 52(a) 'clearly erroneous' rule, even though it is an ultimate question of fact in deciding 'capital asset' status."[167] Likewise here, the ultimate question of fact is the nature of Kitts' home, and the bankruptcy court's determination that its character was that of a residence should not be overturned unless clearly erroneous.

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[163] *Id.* (quoting *Pullman-Standard v. Swint*, 456 U.S. 273 (1982)).

[164] Appellee Brief at p. 3.

[165] *See, e.g., In re Goin,* 808 F.2d 1391, 1393 (10th Cir. 1987) (the bankruptcy court's finding as to nature of a financial obligation was reviewable by the district court under a clearly erroneous standard).

[166] 737 F.2d 479, 481 (5th Cir. 1984).

Winterfox argues that the character of Kitts' home was a corporate asset because (1) Sunpeak held record title to Kitts' home for fourteen months prior to getting the Loans, including when the notices of default were filed on the home; (2) Sunpeak had loaned against the property; and (3) Kitts had previously stated that the home was a Sunpeak asset.[168]

As to Winterfox's argument regarding title, it should be rejected for several reasons. First, if legal title is even relevant to inform the purpose of the Loans, it is undisputed that at the time the Loans were made, Kitts held it.[169] Indeed, because Winterfox's trust deeds are from Kitts individually, its lien claims are dependent on the fact that Kitts had legal title.

Second, even if legal title to the home had been in Sunpeak's name when the Loans were given (which was not the case), legal title to the home would not change the facts that (1) Kitts and his family lived in the home,[170] (2) Kitts and his family were about to lose the home to foreclosure,[171] and (3) the primary purpose of the Loans was to pay off the foreclosing liens so that Kitts and his family could stay there.[172] Winterfox has not cited to a single case where the particulars of legal title to a consumer's dwelling negate the purpose of a loan obtained to save that dwelling from foreclosure. It should further be noted that the provisions of TILA that define high-cost mortgage loans refer only to a loan secured by that consumer's "dwelling."[173] "Dwelling" is further defined under TILA as "a residential structure or mobile home which contains one to four family housing units, or individual units of condominiums or cooperatives."[174] So, under TILA, there is no statutory requirement that legal title to the consumer's dwelling be held by the consumer to state a TILA claim arising from a loan secured by a mortgage on the consumer's dwelling.

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[167] *Id.* at 487.

[168] Appellee Brief at pp. 40-41.

[169] Applt. Supp. Appx. at 135 (Trial Tr. 12/1/09 at p. 201 (testimony of Kitts)).

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170 Applt. Appx. at 18 (Findings and Conclusions ¶ 2); Applt. Supp. Appx. at 128-129 (Trial Tr. 12/1/09 at pp. 182-83 (testimony of Kitts)).

171 Applt. Appx. at 22 (Findings and Conclusions ¶ 39); Applt. Supp. Appx. at 131-32 (Trial Tr. 12/1/09 at pp. 186-87 (testimony of Kitts)).

172 Applt. Appx. at 23 (Findings and Conclusions ¶ 40); Applt. Supp. Appx. at 131-33 (Trial Tr. 12/1/09 at pp. 186-88 (testimony of Kitts)).

173 15 U.S.C. § 1602(aa).

174 15 U.S.C. § 1602(v).

Third, Winterfox's argument that the Loans were made "for the benefit of Sunpeak . . . the true owner of the Property"[175] is inconsistent with its actions at the time the Loans were made. For example, if Kitts were to have been getting a loan for the benefit of Sunpeak and if Sunpeak were, in fact, the true owner of Kitts' home, Winterfox would surely have documented the Loans differently. Winterfox had a title report to the home and, therefore, knew that legal title was in Sunpeak's name.[176] But all of the loan documents prepared by Winterfox are with Kitts in his individual capacity.[177] Sunpeak is mentioned nowhere. So, notwithstanding any present argument to the contrary, Winterfox clearly understood that its Loans were for the benefit of Kitts to allow him to save his family home, to which he held legal title, and not a loan to Sunpeak or to save an asset of Sunpeak.

Finally, any argument by Winterfox that Kitts' purpose in getting the Loans was to save investment property and not his home is completely undone by the TILA Disclosures that Winterfox prepared. Though they were prepared months after the Loans were consummated,[178] thereby giving Winterfox ample opportunity to conform them to its version of the facts, the TILA Disclosures admit that the Loans were made to "Brian

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[175] Appellee Brief at p. 40.

[176] Applt. Supp. Appx. at 106 (Trial Tr. 12/1/09 at p. 70 (testimony of Olivarez)).

[177] Applt. Supp. Appx. at 135 (Trial Tr. 12/1/09 at p. 201 (testimony of Kitts)) and 5-9 (Trial Exs. 1-2).

[178] Applt. Appx. at 19 (Findings and Conclusions ¶ 87).

Kitts" and were to be secured by property used by Kitts as his residence and not as investment property.[179] The fact that Winterfox prepared the TILA Disclosures (which are only required for consumer loans) and fraudulently attempted to back-date them to feign TILA compliance,[180] confirms Winterfox's understanding of the facts found by the bankruptcy court. Had Winterfox believed that Kitts' purpose was to save an investment property held by Sunpeak, Winterfox would not have resorted to such conduct nor made an effort to conceal its fraud with perjury. *See Gallegos v. Stokes*, 593 F.2d 372, 375 (10th Cir. 1979) (stating that the lender "made an attempt to comply with the TILA disclosures requirements, evidently assuming this was a consumer credit transaction. Had he believed then that the sale was [for business purposes] he would not have attempted to comply"). These deceptive actions should preclude Winterfox from now arguing that the facts regarding Kitts' purpose for getting the Loans are other than what its own actions prove.

Furthermore, that Sunpeak encumbered Kitts' home with a $50,000 loan is unavailing to show that Kitts' home was a corporate asset. For this small, one-time encumbrance to define the home's character, a court would have to overlook the numerous encumbrances the Kittses personally placed on their home to provide for their family's needs. For example, since Kitts purchased the home in 1998,[181] he and his wife obtained a personal loan of $605,000 from Washington Mutual secured by the home;[182] Laurie Kitts obtained a $275,000 loan from Crescent Mortgage that was secured by a mortgage on the home in order to purchase a home for her mother;[183] Laurie Kitts borrowed $307,977.67 on a line of credit from Wells Fargo that was secured by a trust deed on the home;[184] and Kitts obtained two personal loans totaling $1,389,603.47 from Winterfox that were secured by the home.[185]

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[179] Applt. Appx. at 29 (Findings and Conclusions ¶ 88); Applt. Supp. Appx. at 30 (Trial Ex. 7 at p. WF 10) and 42 (Trial Ex. 8 at p. WF 22).

[180] Applt. Appx. at 28-29 (Findings and Conclusions ¶¶ 78-87) and 235-36 (Trial Ex. 10 at pp. 16-17); Applt. Supp. Appx. at 21-56 (Trial Exs. 7 and 8).

Winterfox also argues that Sunpeak's listing the home as an asset in its chapter 11 bankruptcy a year before Kitts obtained the Loans changes the character of the home.[186] Yet, consistent with its true character as his residence, Kitts listed his home on the schedules of his personal chapter 13 bankruptcy filed on the same day as Sunpeak's chapter 11 bankruptcy[187] and in his personal bankruptcy from which this appeal arises. The bankruptcy court considered the chapter 11 bankruptcy schedules,[188] and also found that Kitts, his wife and their children lived in the home at all relevant times,[189] and that Kitts held record title when he personally obtained the Loans. [190] Also, Winterfox's claim that Kitts' home "generated business income and incurred business related expenses" [191] is a misrepresentation of the record. Though Kitts personally received a payment for letting people stay at his home for a period of days during the 2002 Winter Olympics,[192] the rental income and management fees claimed by Sunpeak was for leased office space in an office building,[193] not for Kitts' home.

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[181] Applt. Appx. at 18 (Findings and Conclusions ¶ 1).

[182] Applt. Appx. at 19 (Findings and Conclusions ¶ 15).

[183] Applt. Appx. at 20 (Findings and Conclusions ¶ 19-20).

[184] Applt. Appx. at 21-22 (Findings and Conclusions ¶¶ 30, 32).

[185] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 54, 60).

[186] Appellee Brief at p. 41.

[187] Applt. Supp. Appx. at 74 (Trial Ex. 596 at p. 8).

[188] Applt. Appx. at 18 (Findings and Conclusions ¶ 6).

Winterfox further claims that by virtue of Sunpeak listing the home as an asset in its chapter 11 bankruptcy schedules, the Trustee is estopped to claim the property as Kitts' home.[194] But the doctrine of equitable estoppel is inapplicable because Winterfox cannot demonstrate a necessary element of the doctrine—reasonable and actual reliance.[195] Indeed, Winterfox clearly did not rely on this statement in the Sunpeak bankruptcy or on the current title report to the home because it walked through the Kitts home, knew that Kitts lived there with his wife and children,[196] and then drafted all of the loan documents to reflect a personal loan to Kitts secured by a trust deed from Kitts, the record title holder to his home.[197]

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[189] Applt. Appx. at 18 (Findings and Conclusions ¶ 2).

[190] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 58, 63).

[191] Appellee Brief at pp. 41-42.

[192] Applt. Supp. Appx. at 130 (Trial Tr. 12/1/09 at p. 185 (testimony of Kitts)).

[193] Appellee Supp. Appx. at 1055-56 (Trial Tr. 12/3/09 at pp. 69-70 (testimony of Kitts)).

[194] Appellee Brief at pp. 41-42.

[195] *Bass v. Potter*, 522 F.3d 1098, 1106 (10th Cir. 2008) (holding that "[e]quitable estoppel requires a showing of both actual and reasonable reliance") (internal quotations omitted).

Winterfox also claims the bankruptcy court erred in permitting the Trustee to employ equitable alter ego and reverse piercing theories when he claimed that the property was Kitts' home. However, the bankruptcy court's rulings do not rely on such theories, and the Trustee made no such argument,[198] nor need he because these theories are wholly irrelevant. The home has at all relevant times been Kitts' residence.[199] Further, he obtained the Loans personally and held record title when he obtained the Loans.[200]

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[196] Applt. Supp. Appx. at 107 (Trial Tr. 12/1/09 at p. 72 (testimony of Olivarez)).

[197] Applt. Supp. Appx. at 135 (Trial Tr. 12/1/09 at p. 201 (testimony of Kitts)) and 5-9, 57-65 (Trial Exs. 1-2, 54). Winterfox's equitable estoppel argument relies on three inapposite cases in which parties therein relied on statements concerning properties used exclusively for business purposes. In *In re Gordon Car & Truck Rental, Inc.*, 65 B.R. 371, 377 (Bankr. N.D.N.Y. 1986), for example, individuals were estopped from claiming personal ownership of business licenses that had generated significant revenue for a business for 25 years and for which an individual interest was never asserted. And in *Bank of Mauston v. Marachowsky*, 46 N.W.2d 863, 864 (Wis. 1951), an individual was estopped from claiming ownership of a wholesale oil plant that was rented by a corporation that made its rental payments to a second corporation. In *In re Telemark Management Co.*, 43 B.R. 579, 581, 586-87 (Bankr. W.D. Wis. 1984), equitable estoppel applied after the debtor's statement concerning ownership of resort and tourist properties was relied upon by creditors.

[198] By addressing these theories, Winterfox is merely setting up an argument the Trustee did not make simply to strike it down—such theories are irrelevant and have no bearing on this appeal.

The bankruptcy court examined all of the evidence and heard the testimony of and was in the best position to judge the credibility of each witness. Having done so, the bankruptcy court found that the character of Kitts' home was a residence and, therefore, his motivation was to save his home, a purpose covered by TILA. Given the undisputed facts in the record that support these factual findings of the bankruptcy court, they are not clearly erroneous.

B. The Bankruptcy Court Correctly Held That the Majority of the Proceeds of the First and Second Loans Were Used for Personal, Family, or Household Purposes

In addition to Kitts' motivation for getting the Loans, the bankruptcy court also made the factual finding that "the majority of the proceeds of the First and Second Loans were used for personal, family or household purposes."[201] In so determining, the bankruptcy court followed the precedent of those courts that focus on how the consumer uses the borrowed funds, rather than why the consumer got the loan. For these courts, it is the character of the consumer's use of the majority of the borrowed funds that controls the question of "purpose."[202] And when employing this quantitative analysis in the context of a refinancing transaction, as was the context here, courts determine the character of the new loan by reference to the original use of the proceeds from the existing loans that are paid off.[203]

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[199] Applt. Appx. at 18 (Findings and Conclusions ¶ 2).

[200] Applt. Appx. at 24-25 (Findings and Conclusions ¶¶ 58, 63). To the contrary, it is Winterfox who makes the reverse-piercing claim by stating that the Loans were made "for the benefit of Sunpeak, a corporation and the true owner of the Property." (Appellee Brief at p. 40).

[201] Applt. Appx. at 28 (Findings and Conclusions ¶ 74).

To arrive at this conclusive finding, the bankruptcy court made extensive factual findings concerning the use of the Winterfox loan proceeds,[204] including the purpose of the three obligations paid off by the Winterfox loan proceeds that were incurred for personal, family, or household purposes (i.e. the Ingram lien, the Washington Mutual Loan, and the Wells Fargo Loan).[205] These findings include:

a. "Because Ingram's lien arose from the building of the three-car garage to the Residence, any payment from the Winterfox loans to Ingram was attributable to personal, family, or household purposes."[206]

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[202] *See, e.g., Stillman v. First Nat'l Bank*, 791 P.2d 23 (Idaho 1990) (concluding that a loan was exempt from TILA where the debtor used $16,411 of a total loan amount of $32,000 for business purposes).

[203] *See, e.g., Toy Nat'l Bank v. McGarr*, 286 N.W.2d 376, 378 (Iowa 1979) (holding that "the only workable approach is to characterize a loan transaction by the use to which the proceeds are originally placed and maintain the same characterization throughout the life of the loan").

[204] Applt. Appx. at 18-22, 27-28 (Findings and Conclusions ¶¶ 8-38, 73-74).

[205] Applt. Appx. at 18 (Findings and Conclusions ¶ 8) ("Several liens also encumbered the Residence. The various encumbrances are set forth chronologically below, with a finding of whether the character of each encumbrance was either business or personal for the ultimate purpose of determining if TILA applies to Winterfox's loans.").

[206] Applt. Appx. at 19 (Findings and Conclusions ¶ 14).

b. "In November 2001, the Debtor and Laurie Kitts were spending significant funds to finish the construction for the three-car garage they were constructing at the Residence, and they needed [the Washington Mutual Loan] to cover living expenses and to finish the construction project."[207]

c. "The aforementioned facts establish that the majority of the Washington Mutual Loan proceeds were used for personal, family or household purposes."[208]

d. "Laurie Kitts obtained the Wells Fargo Loan to pay family living expenses and to complete the three-car garage addition to the Residence."[209]

e. "The testimony and evidence presented at trial establish that a majority of the Wells Fargo Loan proceeds were used for personal, family, or household purposes."[210]

These factual findings of the bankruptcy court are implicated by Winterfox's "Issue No. 1" of its cross-appeal: "Did the Bankruptcy Court err when it found that the majority of the proceeds from the Bridge Loan were *used to pay off obligations incurred primarily for personal, family, or household purposes* as opposed to business purposes?"[211] But these findings of fact concerning the Kittses' purposes for incurring these obligations "must not be set aside unless clearly erroneous, and the reviewing court

[207] Applt. Appx. at 19 (Findings and Conclusions ¶ 16).

[208] Applt. Appx. at 21, 27 (Findings and Conclusions ¶ 29, 73). The bankruptcy court identifies the exact dollar amount of the Washington Mutual Loan proceeds that were used for personal purposes at Finding of Fact ¶ 73 at Applt. Appx. at 27.

[209] Applt. Appx. at 21 (Findings and Conclusions ¶ 31).

[210] Applt. Appx. at 22, 27 (Findings and Conclusions ¶¶ 38, 73). The bankruptcy court identifies the exact dollar amount of the Wells Fargo Loan proceeds that were used for personal purposes at Finding of Fact ¶ 73 at Applt. Appx. at 27.

[211] Appellee Brief at p. 3 (emphasis added).

must give due regard to the trial court's opportunity to judge the witnesses' credibility."[212] Moreover, other courts have also held that a trial court's determination concerning the nature of obligations is a factual issue reviewed under the "clearly erroneous" standard.[213]

Notwithstanding Winterfox's identification of this issue, Winterfox has failed in its brief to make any argument regarding the Kittses' purposes for incurring these obligations or how they used the proceeds of the underlying loans. Any argument on the issue is, accordingly, waived.[214] Moreover, Winterfox's arguments concerning the purpose of the Winterfox loans do nothing to address this issue. That the Trustee herein analyzed the standard of review for this issue and anticipated the findings of fact that

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[212] Fed. R. Civ. P. 52(a)(6).

[213] *See* discussion *supra* Part II.A.

[214] *United States v. Wayne*, 591 F.3d 1326, 1332 n. 4 (10th Cir. 2010) (citing *Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) ("[W]e routinely have declined to consider arguments that are not raised, or are inadequately presented, in an appellant's opening brief")); Federal Rule of Bankruptcy Procedure 8010(a)(1)(E) (The brief of the appellant (or cross-appellant) must "contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." This rule applies here because the district court has not by local rule provided otherwise for the form for the parties' briefs.); *see also Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004) ("Scattered statements in the appellant's brief are not enough to preserve an issue for appeal.").

Winterfox would dispute does not permit Winterfox to argue this issue for the first time in its reply brief.[215]

C. The Bankruptcy Court Correctly Held That Winterfox is Not Entitled to Attorney's Fees and Costs for Defending the TILA Action

Citing *Hefferman v. Bitton*,[216] the bankruptcy court held that a creditor that successfully defends a TILA action may recover attorney's fees only for aspects of litigation that are specifically provided for under the note.[217] The bankruptcy court further held that the notes for the Loans only allow Winterfox's attorney's fees for the "costs and expenses of collection" and that Winterfox's defense of the TILA action was not an effort to collect the debt. Therefore, the bankruptcy court denied Winterfox recovery of its attorney's fees for defending the TILA action.[218]

The bankruptcy court's reliance on *Hefferman* is well-taken. The attorney's fees provision of the notes in *Hefferman* is similar to that here in that it only provides for fees for "action[s] instituted on this note." The *Hefferman* court held that the creditor's defense of a TILA action is not an action to collect on the note and, therefore, denied the creditor his attorney's fees.[219]

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[215] *Kane v. Town of Harpswell (In re Kane)*, 254 F.3d 325, 331 (1st Cir. 2001) (an appellee's defense of the court's decision in his response brief does not permit an appellant to raise an argument for the first time in his reply brief).

[216] 882 F.2d 379, 384 (9th Cir. 1989).

[217] Applt. Appx. at 34 (Findings and Conclusions ¶ 29).

[218] Applt. Appx. at 34 (Findings and Conclusions ¶ 30).

In addition to being supported by case law, the bankruptcy court's ruling is supported by Winterfox's own admissions. For example, by admitting that the Trustee's TILA action did not affect the validity or enforceability of Winterfox's loan,[220] Winterfox admits that even a successful defense would not result in a collection of the debt, nor would an unsuccessful defense preclude its collection—thus, its defense of the TILA action has no effect on its effort to collect the debt.[221] Given this fact, Winterfox fails to explain why it had to wait until the adversary proceeding had concluded to obtain relief from the automatic stay or, even if this were true, how this would change the character of its TILA defense into an action to collect on the debt.[222]

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[219] *Hefferman*, 882 F.2d at 384.

[220] Appellee Brief at p. 44-45 (citing 15 U.S.C. § 1610(d); *In re Moses*, 9 B.R. 370, 374 (Bankr. N.D. Ga 1981); *First Citizens Bank & Trust Co. v. Owings*, 259 S.E.2d 747, 749 (Ga. Ct. App. 1979)). Moreover, at trial, Winterfox made it clear that the collection of the note was not at issue in the adversary proceeding: "[T]his [adversary proceeding] is a stand-alone claim for damages against Winterfox. It does not affect the validity of the note or the trust deed that is the subject of the Proof of Claim in the bankruptcy." (Applt. Appx. at 95a (Trial Tr. 12/1/09 at p. 179)).

[221] *See Lacy v. General Finance Corp.*, 651 F.2d 1026, 1029 (5th Cir. 1981) (stating that "a claim for the underlying debt may be won or lost regardless of the outcome of the TILA claim.").

[222] Appellee Brief at p. 46.

Furthermore, Winterfox misinterprets the attorney's fee provision of the Loan Agreement, which Winterfox drafted narrowly such that it does not cover the defense of the TILA action. For example, the TILA action did not arise from any dispute "in connection with *any of the provisions* of this [Loan] Agreement,"[223] but rather from Winterfox's failure to provide the notices and disclosures required under TILA, a federal statute, and Winterfox fails to point to any provision of the Loan Agreement disputed in the TILA action. Thus, Winterfox cannot collect its attorney's fees under the Loan Agreement.

The cases Winterfox cites are inapposite. In *Mortgage Mint*[224] and *Weber*,[225] the attorney's fee provisions were significantly more broad than those in Winterfox's notes or the Loan Agreement. For example, in *Mortgage Mint*, the prevailing party would recover attorney's fees simply "if suit or action were to be filed."[226] And in *Weber*, the provision covered all attorney fees "incurred *in connection with the note*, and in connection with any action or suit arising out of the note."[227] The attorney's fees provisions that Winterfox drafted here are much more narrow—they cover collection efforts and disputes concerning the provisions of the Loan Agreement and, therefore, do not cover Winterfox's defense of the TILA action.

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[223] Applt. Supp. Appx. at 64 (Trial Ex. 54 at Kitts 637) (emphasis added).

[224] *Mortgage Mint Corp. v. Morgan,* 708 P.2d 1177 (Ore. App. 1985).

[225] *Weber v. Langholz*, 46 Cal. Rptr. 2d 677, 682 (App. 2d Dist. 1995).

[226] *Mortgage Mint Corp.,* 708 P.2d at 1178. The holding in *Mortgage Mint* is further distinguished in that the lender recovered its fees because the borrowers asserted their TILA claim as a counterclaim to the lender's foreclosure action. In contrast here, Winterfox has clearly stated that the TILA action was a "stand-alone claim" with no effect on Winterfox's ability to collect on the debt through its proof of claim. (Applt. Appx. at 95a (Trial Tr. 12/1/09 at p. 179).)

Most importantly, this Court should not even consider Winterfox's arguments for the recovery of attorney's fees for the defense of the TILA action because Winterfox is raising them for the first time on appeal.[228] Winterfox, for example, made no argument concerning the recovery of its fees in its proposed findings of fact and conclusions of law,[229] nor in its trial brief,[230] nor in its opening or closing statement of trial.[231] Moreover, Winterfox failed to offer any evidence of the attorney's fees it incurred at trial, and consequently has no such evidence that it can reference for this Court.[232] Furthermore, though the issue of attorney's fees *under the notes* was raised in the Pretrial Order, Winterfox did not even seek attorney's fees pursuant to the Loan Agreement.[233] For these reasons, Winterfox cannot argue for the recovery of its attorney's fees (under any document) for the first time before this Court.

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[227] *Weber*, 46 Cal. Rptr. 2d at 682 (emphasis added).

[228] *Turner v. Public Serv. Co.*, 563 F.3d 1136, 1143 (10th Cir. 2009) (refusing to consider arguments raised for the first time on appeal).

[229] Adv. Proc. Docket No. 240.

[230] Adv. Proc. Docket No. 239.

[231] Adv. Proc. Docket Nos. 304, 305.

[232] On this failure alone, this Court should defer to the bankruptcy court's ruling that denied Winterfox a recovery of its attorney's fees. (*See Youren v. Tintic Sch. Dist.*, 343 F.3d 1296, 1310 (10th Cir. 2003) (deferring to district court's rulings where party failed provide any record evidence on the issue of attorney's fees)(citing *Mile High Indus. v. Cohen*, 222 F.3d 845, 853 (10th Cir. 2000) ("Because [the appellant] failed to reference the record in support of its contentions, we will not consider them or sift through the record in support thereof, but instead defer to the district court's rulings.").

CONCLUSION

For the reasons set forth above and in the Appellant's Brief filed by the Trustee, this Court should reverse the bankruptcy court's orders (1) dismissing the TILA claims in the original complaint and (2) striking the amended complaint.

DATED this 5th day of April, 2010.

PRINCE, YEATES & GELDZAHLER
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By:________________________
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[233] Adv. Proc. Docket No. 226 at p. 14. Notably, Winterfox's proof of claim, which seeks attorney's fees under the notes, does not even attach the Loan Agreement. (Applt. Supp. Appx. at 10-20 (Trial Ex. 6)).

CERTIFICATE OF SERVICE

I certify that on the 5th day of April, 2010, I served the foregoing by transmitting a copy of the same, to the following parties in the manner indicated:

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ADDENDUM FILED CONCURRENTLY

APPELLANT'S SUPPLEMENTAL APPENDIX FILED CONCURRENTLY